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## ON THE CONCEPTION OF SOVEREIGNTY.

AUSTIN'S famous definition of sovereignty is expressed by him in the following sentence:

"If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." —*Lectures on Jurisprudence*, Lecture VI., vol. i. p. 226 (Edit. 4, 1879).

The definition of a positive law, which is the counterpart of the definition of sovereignty, is given toward the close of the same prolonged "lecture":

"Every positive law (or every law simply and strictly so called) is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme." —*Ibid.*, p. 339.

It is thus the fundamental assumption of the English school of jurisprudence and of the English writers on political science who follow in the path marked out by Hobbes, Bentham, and Austin, that in every political society sovereign power always resides in certain determinate persons (one, few, or many), and that all true laws (*i. e.*, laws which the law-courts would recognize as such) may be regarded as the commands of this sovereign. A consequence of this conception of sovereignty is that the classification of the forms of government becomes rigidly precise, simple, and, it must be added, quite remote from the ordinary use of language either among practical politicians or among the most scientific of political historians. The phrases "mixed government" and "limited monarchy" are abominations to Austin and Cornwall Lewis, as much

as the facts supposed to correspond to these phrases were to their great precursor, Hobbes. Hobbes had political prejudices, as well as logical reasons, for his antipathy. In the case of Austin the motive force is the intense disgust provoked by that vagueness and obscurity of Blackstone which had already called forth Bentham's *Fragment on Government*. Vague uses of the term "law" and traditional laudations of mixed government, and of the surpassing perfection of the British Constitution, inevitably caused a reaction; and the confused prolixity of Blackstone must serve as the excuse for the seemingly precise prolixity of Austin.

The Austinian jurisprudence, which, in spite of Austin's German studies, is thoroughly English in its antecedents (except in so far as we regard the theories of Hobbes as due to the influence of Bodin), has produced a great effect on English legal and political thinking; but outside of England and English colonies it has produced no effect whatever—none certainly, in France or Germany or Italy; none in Scotland, nor, with very slight exceptions, in the United States of America.<sup>1</sup> Its dominant authority in England has finally begun to be weakened by the introduction of the historical method into the study of law—above all by the great work done and the ideas suggested by the late Sir Henry Maine. Sir Henry Maine has pointed out, that throughout the greater part of the world and during the greater part of human history, there have been no such sovereign legislating bodies as Austin supposes; and that, where we might consider all the conditions of sovereignty, according to Austin's conception, to be found, as, for instance, in the case of Runjeet Singh, the Sikh despot of the Punjab, such a sovereign ruler never made a single law in Austin's sense. (*Early History of Institutions*, p. 380.) As Professor Clark puts it: "That the sovereign

<sup>1</sup> Cf. an article on "National Sovereignty," in the Political Science Quarterly [New York] for June, 1890, by Mr. J. A. Jameson, who mentions only two American writers as followers of the "analytical jurists." P. 196.

makes, or *sets*, such rules in the first instance is contrary alike to philology, history, and legal tradition, all of which indicate an element of original approval or consent by the whole community." (*Practical Jurisprudence: A Comment on Austin*, pp. 167, 168.) "If we look at the history of all early societies," says Sir William Markby, who is not unfriendly to Austin (*Elements of Law*, edit. 2, p. 24), "we find that the principal duty of the sovereign in time of peace is not the making of law, but the decision of law-suits." Law is older than sovereignty; primitive law is the custom of the tribe, and the earliest type of sovereignty is exhibited, apart from leadership in battle, in pronouncing judgments, not in making laws. That one person or a determinate body of persons should make laws would be a profane and monstrous idea in the eyes of the members of primitive societies. The legislative activity of the sovereign comes very late in the process of political development; and the great historical interest of the writings of Bentham and Austin is just that they are contemporary with, and supply a theoretical justification for, the quickening of legislative activity in England.

Historical considerations are, however, in themselves no argument against the Austinian conceptions of law and sovereignty—any more than it is an argument against the social contract theory to point out that the date of the original contract has not been fixed by Jean Jacques. A perfectly unhistorical theory may be useful as a means of analysis. Hobbes supplied the principle according to which the Austinian conception must be interpreted. "The legislator is he (not by whose authority the law was first made, but) by whose authority it continues to be a law" (quoted by Austin, *Jurisprudence*, i. p., 337). Thus, where a rule of English common law has not been interfered with by parliamentary statute, we may regard it as "set" by Parliament, because Parliament could interfere with it, should such interference be considered expedient. What is permitted or suffered to continue we may, by a little

twisting of language, by one of those fictions so dear to the conservative legal mind, consider to be commanded. Of course, when we extend this principle of interpretation from highly-developed political societies, where the sovereign is constantly legislating, to more primitive societies where there is no legislative activity, the extreme artificiality of the procedure is forced on our notice. It becomes absurd to say that the Great King of Persia at one time commanded the Jews to keep the Sabbath, because he did not forbid them to do so. The application of the historical method and the genuine scientific study of the origins and sources of law do not refute a professedly unhistorical theory, but they tend to weaken our sense of its importance. And yet we must not allow the glamour of the historical method to blind us to the value of the analytic. As Professor Dicey reminds us:

"The possible weakness of the historical method as applied to the growth of institutions, is that it may induce men to think so much of the way in which an institution has come to be what it is that they cease to consider with sufficient care what it is that an institution has become."—*The Law of the Constitution*, pref. to first edition.

But the value of the analytic method is not necessarily the same thing with the value of the analytic method as practised by Austin.

"The procedure of the analytical jurists," says Sir Henry Maine (*Early History of Institutions*, pp. 360, 361), "is closely analogous to that followed in mathematics and political economy. It is strictly philosophical, but the practical value of all sciences founded on abstractions depends on the relative importance of the elements rejected and the elements retained in the process of abstraction. Tried by this test, mathematical science is of greatly more value than political economy, and both of them than jurisprudence as conceived by the writers I am criticising."

This comparison between the English school of jurisprudence and the characteristically English school of political economy is admirable. If competition be perfectly unfettered by either law or custom or the force of habit or

the presence of ordinary human feelings, *if* capital be absolutely transferable, and *if* (what is still more impossible) labor be absolutely transferable, *then* the Ricardian political economy would represent actual facts. But with a sufficient number of "ifs," it would be possible to write any number of scientific works, every sentence in which might be as painfully and uselessly true as Mr. Froude found the *Proverbial Philosophy* of Martin Tupper.<sup>1</sup>

But is this method of abstraction inseparable from an analysis of what is? And is Maine right in calling it "strictly philosophical"? Aristotle would have objected that to be strictly philosophical we must adapt our methods to the subject-matter of our study, and that the methods available in mathematics are not applicable in the study of the science of wealth and of the science of law, which are branches of the great science of human society. If we try to get strict accuracy and precision where the subject-matter does not admit of it, we shall find ourselves left with mere empty words and abstract formulæ which give us no insight into reality, although they may indeed be valuable as a means of criticising the more confused and less conscious abstractions of common talk or of so-called popular philosophy. And, as a mere matter of terminology, is it not rather the business of the "philosopher" to correct the one-sided "abstractions" inevitable in ordinary language and indispensable in the procedure of the various special sciences? At least, we may reasonably expect from a philosophy of law, and even from a science of jurisprudence, that it shall have some applicability, if not to primitive societies, at least to the states which the theorist had before his eyes.

Now, this is the restricted claim made on behalf of Austin by his apologists at the present day. As Professor Holland puts it: "It is convenient to recognize as laws

<sup>1</sup> Bagehot, in his "Economic Studies" (republished in the Postulates of English Political Economy, 1885) compares the *insularity* of the Ricardian political economy and the Austinian jurisprudence.

only such rules as are enforced by a sovereign political authority, although there are states of society in which it is difficult to ascertain as a fact what rules answer to this description." (*Jurisprudence*, p. 43.) Let us see, then, how the Austinian conception may be applied to the British Constitution. Here there is a noteworthy difference between Austin and his follower, Sir George Cornewall Lewis. Austin finds the sovereign in the United Kingdom in king, lords, and commons—meaning by "commons" the electors of the House of Commons. "Speaking accurately," he says (i. p. 253) "the members of the commons' house are merely trustees for the body by which they are elected and appointed; and consequently, the sovereignty always resides in the kings and the peers, with the electoral body of the commons." Lewis, on the other hand, agrees with Blackstone that "the sovereignty of the British Constitution is lodged in the three branches of Parliament" (*Use and Abuse of Political Terms*, ed. by Sir R. K. Wilson, p. 49), *i. e.*, in the King, the House of Lords, and the House of Commons. As we are here expressly dealing with a question of jurisprudence and not of history, it would be idle to discuss the question debated between lawyers and historians whether the king is or is not a part of Parliament. The historian is perfectly right in pointing out that the preamble of any Act of Parliament, preserving as it does the old theory of the Constitution, makes the king (or queen) distinct from the three estates in Parliament assembled, "by and with the advice and consent of" whom he (or she) enacts "as follows." And yet we may allow the lawyer, for the sake of the convenience of speaking of the sovereignty of Parliament, to follow the phraseology of Blackstone and define Parliament so that it includes the king (Dicey, *Law of the Constitution*, ed. 3, p. 37). Lewis's editor, Sir R. K. Wilson, points out that what Lewis himself has laid down as one of the "marks of sovereignty," viz.: "irresponsibility," is most certainly to be found in the body of the electors (*Use and Abuse of*

*Political Terms*, p. 47, note). "Irresponsibility" does certainly seem in a fuller sense to belong to the elector than to the member of Parliament. Neither is indeed legally responsible for the way in which he uses his right of voting: the "moral" responsibility of the member to his constituents is forcibly brought home to him when a dissolution is at hand, whereas no determinate persons (unless it be landlords or employers who "put on the screw") force his responsibility on the notice of the free and independent elector. There is always a penalty in the former case, but not always (fortunately) in the latter. But the other mark of sovereignty laid down by Lewis is "necessity of consent." On this his editor remarks: "When the sheriff returns a member as duly elected, is it not a public act to which the consent of the electors is necessary"? This seems a rather forced application of the conception, compared with the fact, on which Lewis insists, that the House of Commons must consent to the passing of a law. The electors need not consent in order that the law should be sufficiently a true law to be enforced by a law-court. Thus, one of Lewis's "marks" seems to suit the electors better, and the other, the elected.

This difficulty, and the divergence of view between Austin and Lewis, force on our attention the fundamental confusion in Austin's apparently clear and precise theory. Recent apologists of the English school of jurisprudence have generally put forward the defence that the sovereign body—in Austin's sense—is the body behind which the lawyer *quâ* lawyer does not look. Mr. Frederic Harrison has summed up Austin's analysis of sovereignty and law in the two following propositions:

"I. The source of all positive law is that definite sovereign authority which exists in every independent political community and therein exercises *de facto* the supreme power, being itself unlimited, as a matter of fact, by any limits of positive law.

"II. Law is a command relating to the general conduct of the subjects, to which command such sovereign authority has given legal

obligation by annexing a sanction, or penalty, in case of neglect." (Art. on "The English School of Jurisprudence," *Fortnightly Review*, vol. xxx. pp. 484, 485.)

Now, if this is to be the interpretation of Austin, if we are only to consider what the sovereign is for the purposes of the lawyer, Austin is quite wrong in going behind the House of Commons to the electorate. For the lawyer *quâ* lawyer a law is good law though it were passed by a Parliament which had abolished the Septennial Act and had gone on sitting as long as the Long Parliament, quite as much as if the law were passed by a newly-summoned parliament, of the elected part of which an overwhelming majority had been returned expressly pledged to vote for this very law. With the wishes or feelings of the electors the lawyer as lawyer has nothing whatever to do, however much they may affect him as a politician or as a reasonable man. The luminous exposition of this point by Professor Dicey (*Law of the Constitution*, ed. 3, pp. 68-72) makes it unnecessary to say more. As Professor Dicey points out, Austin's doctrine is "absolutely inconsistent with the validity of the Septennial Act." "Nothing," he adds, "is more certain than that no English judge ever conceded, or under the present Constitution can concede, that Parliament is in any legal sense a 'trustee for the electors.'" (P. 71.)

If anyone were to object that our supposition is an impossible one, and to urge that no Parliament, *now* at least, could prolong its existence indefinitely—nay, that no Parliament now, elected under a Triennial Act, could pass a Septennial Act, without first "going to the country" on that very question, and if we were to ask such an objector "Why"? would not the answer be: "Because the country would not stand it"? That is to say, behind the sovereign which the lawyer recognizes there is another sovereign to whom the legal sovereign must bow. The "legally despotic" sovereign, if that means our "omnipotent" Parliament, is very strictly limited in some ways. It is essen-

tial, therefore, to distinguish between the “legal sovereign” and the “ultimate political sovereign.” Or, rather, to make the distinction complete at once, let us distinguish (1) the *nominal* sovereign, (2) the *legal*, and (3) the *political*. This distinction would serve to obviate a great many ambiguities. It is no new distinction; but it is to be found formulated in Locke’s somewhat cumbrous phraseology in his second *Treatise on Civil Government*, ch. xiii. §§ 149, 151.

“Though in a constituted commonwealth, standing upon its own basis, and acting according to its own nature—that is, acting for the preservation of the community—there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate; yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. . . . In some commonwealths, where the legislative is not always in being, and the executive is vested in a single person, who has also a share in the legislative, there that single person, in a very tolerable sense, may also be called supreme, not that he has in himself all the supreme power, which is that of law-making, but because he has in him the supreme execution from whom all inferior magistrates derive all their several subordinate powers, or, at least, the greatest part of them; having also no legislative superior to him, there being no law to be made without his consent, which cannot be expected should ever subject him to the other part of the legislative, he is properly enough in this sense supreme.”

In these passages we have the distinction between what I have called the legal sovereign, the political sovereign, and the nominal sovereign, expressed in a manner applicable to the English Constitution. Locke, it will be observed, does not shirk the verbal paradox of saying that there are three supremes, and yet there is not one supreme. Here at least he makes an analysis of institutions without adopting a method of abstraction which sacrifices truth and convenience to the mere appearance of precise and consistent terminology.

Hobbes, from whom the Austinian conception of sovereignty comes, purposely identifies all the three meanings of sovereign. I do not wish to deny for a moment the

immense value in political philosophy of the unflinching, though narrow logic of Hobbes. Hobbes's theory of sovereignty is, of course, equally applicable to aristocracies and democracies; but, with regard to England as is obvious enough from the curious dialogue or rather catechism which goes by the name of *Behemoth*, his theory may be described as that of a political nominalist, in the sense that he argues from names to things. Because the king of England is called "sovereign," therefore there is no other "legal sovereign"—the Parliamentarian lawyers were only talking what Austin would have called "jargon." That there is no other "political sovereign" Hobbes seeks to prove by his ingenious adaptation of the social contract theory, which in all other political writers had served the purpose of vindicating the right of a people to resist tyrants. Hobbes, like Thrasymachus in Plato's *Republic*, makes all laws (legal and moral) dependent on the will of a sovereign; in the phraseology of his own theory he allows no natural rights (with the inconsistent exception of the right of preserving one's life) to persist in civil society. If we translate his thought out of the fictions in which it is formulated, the practical lesson which he wishes to teach is this:

There are only two alternatives—a strong government or anarchy. It is better to submit to any kind of authority, however much you dislike it, than to face the worse evils of universal war.

Locke's threefold distinction in the meaning of sovereignty allows him to escape the conclusion of Hobbes, and prepares the way for Rousseau. According to Hobbes, natural rights are transferred to the legal sovereign (and the legal sovereign is identified with the nominal); according to Rousseau, the legal sovereign is only the minister of the sovereign people, to whom the natural rights of each individual are transferred without being lost.<sup>1</sup>

<sup>1</sup> "Trouver une forme d'association qui défende et protégé de toute la force commune la personne et les biens de chaque associé, et par laquelle chacun,

Austin brushes aside the historical use of "sovereignty" for the sovereignty of a prince. The historically true and very convenient phrase "limited monarchy" makes him and his followers almost angry. As we have seen, his apologists generally understand his sovereign in the sense of the legal sovereign; but he himself, by including the electorate in the sovereign of Great Britain, has gone behind the sovereign for the lawyer *quâ* lawyer. When Austin speaks of the "bulk" of the community being in the "habit" of obedience, he indicates that a vague consent of an *indeterminate* number of persons is necessary to the real power of the legal sovereign, thus practically recognizing a sovereignty behind the legal sovereign; but Austin will not apply the term sovereign at all except to a determinate number of persons. Now the electorate of Great Britain is certainly a determinate number; but is it true to say that it is solely by the consent of the electorate that the House of Commons has its power? Can we say that Austin has indicated the ultimate political sovereign in Great Britain? It is, of course, true that the electors have an easy and constitutional way by which to make the members of the House of Commons feel that, though legally irresponsible, they are actually responsible. The electorate has the power of creation and annihilation. It can make a not-M.P. into an M.P., and it can determine that an M.P. shall in future sit—outside the house. But this only represents the constitutional relation of the electorate to the House of Commons. As a matter of fact, can we say that it was to the electorate of the House of Commons that King and Lords gave way in 1832? Even persons who are not electors can always make a riot, and sometimes a revolution. But when we pass outside a body such as the electorate, we are no longer dealing with "determinate persons."

s'unissant à tous, n'obéisse pourtant qu'à lui-même, et reste aussi libre qu'auparavant." Tel est le problème fondamental dont le contrat social donne la solution. Contr. Soc. I. c. vi.

If we turn from the British Constitution to the Constitution with which it is always most profitable to compare it—the Constitution of the United States of America—the contrast with regard to the “legal sovereign” is obvious, and has been clearly brought out by Professor Dicey. The lawyer *quâ* lawyer can go behind an Act of Congress or an act of the legislature of one of the States to the Constitution of the United States, or, in matters affecting a particular State and not reserved to the government of the United States, to the Constitution of that particular State. No English court can set aside an Act of Parliament as bad law; if an Englishman says anything that Parliament does is unconstitutional, he only means that *he* does not approve of it, or that *he* thinks it contrary to what *he* considers “the spirit of the Constitution”: he is merely expressing his own private opinion. But an American court can refuse to give judgment in accordance with an Act of Congress which seems to it to violate the Constitution; and when an American says an Act of Congress is unconstitutional, he is saying something that (whether true or false) has a perfectly definite meaning for the lawyer *quâ* lawyer. Now Austin, on the lookout for determinate persons, could not be content to call the written Constitution sovereign, but finds sovereignty in those persons who have the power of altering or amending the Constitution.

“I believe,” he says (*Jurisprudence*, i. p. 268), “that the common government, or the government consisting of the congress and the president of the united states, is merely a subject minister of the united states’ governments. I believe that none of the latter is properly sovereign or supreme, even in the state or political society of which it is the immediate chief. And, lastly, I believe that the sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the states’ governments *as forming an aggregate body*: meaning by a state’s government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature, and which, the union apart, is properly sovereign therein.”<sup>1</sup>

<sup>1</sup> The pedantic absence of capitals is Austin’s own, and implies no intention of insult.

With regard to the non-sovereignty of Congress and President and of the States' legislatures within each State there is no dispute. If anyone were to point out that within each State the body of the electors is sovereign in all those matters not expressly reserved by the Constitution of the United States, an Austinian would answer that, since the Constitution may conceivably be altered, the makers of State Constitutions are subject to the makers of the Constitution of the United States—which seems a sufficiently good answer, though it would compel one to give up the phraseology of the *Federalist*, according to which a portion of sovereignty remains in the individual States (No. Ixii.). Instead of "remains in," we must say "is delegated to." The analytic method would invert the historical theory of the Constitution. That, however, is, as we have already allowed, no argument against its value. But is the body who can alter the Constitution of the United States the legal sovereign behind which the lawyer *quâ* lawyer cannot go? Austin draws his inference from Article V. of the Constitution, which provides the mechanism for the amendment of the Constitution; but he stops his quotation without giving the last clause of the Article, which is as follows:

"Provided that . . . . no State, without its consent, shall be deprived of its equal suffrage in the Senate."

Now, a non-American feels some diffidence in putting this problem: Suppose that an amendment is carried, in due form, that a certain State shall in future have only one member in the Senate, but the State in question does not consent, what will be the legal position of the second Senator returned by that State? If he is not allowed to take his seat, Article V. of the Constitution has been violated, a revolution has been effected, and the legal sovereign has been changed; if the amendment is considered unconstitutional by the court, then the body empowered to amend the Constitution is *not* the legal sovereign, and a

few written words are supreme over these determinate persons. Thus, Austin, in his search for determinate persons, must wander about till he finds George Washington, James Madison, and a large number of other persons who (a Scotchman may be permitted, and expected, to remark) are now dead.

Of course it may be said that such a violation of the last clause of Article V. is impossible in America, just as the abolition of the Triennial Act would now be impossible in England. That may be true; but it is irrelevant, if we are looking for the legal sovereign, as explained by Austin's apologists. Behind the legal sovereign there are such feelings as reverence for the past, imperative needs in the present, and hopes for the future—which feelings, however, are to be found in indeterminate, and not in determinate persons. The ultimate political sovereign is not a determinate body of persons. And we have just seen that there may be a difficulty even in finding the legal sovereignty in every case in a determinate body of persons.

With regard to the nominal sovereign, it must also be clear that this is not always a determinate person. No constitutional monarchy has, indeed, as yet followed the suggestion of Condorcet and employed an automaton on the throne—"to put the dots on the *i's*." In a republic it may be convenient to have an individual at the head of the executive; but there might be a republic without a president. In the Swiss Confederation, the President of the Federal Council is only the chairman of a board. The President of the United States, though more powerful in many respects than any constitutional king, and though he takes a place in public prayers and in the drinking of toasts parallel to that occupied by emperors and kings, is certainly not the nominal sovereign. "The United States of America" is the nominal sovereign in America in regard to certain matters, and "the Commonwealth of Massachusetts," "the State of New York," etc., in regard to others. "The French Republic" is the nominal sovereign

in France, and was so for some time after the First Napoleon and his imitator had called themselves "Emperors," just as in ancient Rome "the Senate and People" was the nominal sovereign during the despotism of the Senatorial oligarchy and during the despotism of the Cæsars.

Mr. Herbert Spencer (*The Man versus the State*, p. 81), while apparently accepting Austin's conception of sovereignty as residing in certain determinate persons, strongly objects to sovereignty being considered unlimited. "Austin," he remarks, "was originally in the army"; and this serves him as a psychological explanation of Austin's theory. "He assimilates civil authority to military authority." Now, Mr. Spencer seems to me to find fault just with what is permanently valuable in Austin's conception of sovereignty. That a sovereign is supreme is indeed an identical proposition, but a proposition which it was very important to assert. If, with Austin's apologists, we assume that the attributes of sovereignty belong to the legal sovereign, then the only escape from endless ambiguities, both in theory and practice, is to insist that the sovereign in every state is, in Austin's striking phrase, "legally despotic." I shall consider afterward whether in any sense the ultimate political sovereign can be said to be limited. The nominal sovereign need not cause a difficulty, because the nominal sovereign, whether an individual person or a name, is only the representative of the legal and political sovereigns.<sup>1</sup> The legal despotism of the legal sovereign means only that the legal sovereign cannot be made legally responsible without a contradiction in terms. As Aristotle would say, "Otherwise we must go on to infinity." But this brings out the more clearly the responsibility of the legal sovereign to moral influences and to

<sup>1</sup> As Locke puts it, in the latter part of § 151 of his second Treatise on Civil Government: He "is to be considered as the image, phantom, or representative of the commonwealth, acted by the will of the society, declared in its laws, and thus he has no will, no power, but that of the law." This is true *à fortiori* of a nominal sovereign that is not a person.

physical force. Hobbes did a great service to civil liberty by making men fully aware of what the sovereignty of a monarch implied. And Austin appropriately cites the declaration of Algernon Sidney, that no society can exist without arbitrary powers. "The difference between good and ill governments is not that those of one sort have an arbitrary power, which the others have not; but that in those which are well constituted, this power is so placed as it may be beneficial to the people." (Observe, he does not say merely "*exercised* beneficially for the people.") Austin clearly sees what Mr. Spencer is unable to realize, that without the legal restraints enforced by a supreme government there cannot be civil liberty. In Locke's words, "where there is no law there is no freedom."<sup>1</sup>

Bluntschli, who by no means shares Mr. Spencer's antipathy to the State, shares his objection to unlimited sovereignty. (*Theory of the State*, Eng. tran., p. 464.) But we may safely say that no one trained in the Austinian jurisprudence could have fallen into the confusions of a passage in Bluntschli (*ibid.*, p. 508), where he declares that "in no case can an official be bound to render obedience which would violate the higher principles of religion and morality, or make him accomplice in a crime. Such acts can never be the duty of his office. The servant of the State cannot be required to do what a man would refuse from humanity, a believer from religion, or a citizen from regard to the criminal law of the land." What does he mean by "bound"? An official cannot be *legally* bound to break "the law of the land"; but he cannot *legally* claim to disobey a command, which, though not contrary to the law of the land, he considers contrary to *his* morality and *his* religion, and yet to remain an official. Morally, of course, he may consider himself bound to break the law of the land, and there are cases where such protest may be made most effective by an official breaking a law which violates the moral feelings of the community, and leaving to the

<sup>1</sup> *Treatise on Civil Government*, ii. § 57.

authorities the moral odium of removing or punishing him. Bluntschli's confusion is perhaps more excusable than it appears to an English reader, because of the distinction in Germany between Administrative Law and the ordinary law binding on non-officials. In England, as Professor Dicey has clearly pointed out, we have no *droit administratif*. But, at the best, such a dictum as Bluntschli's can do no good, theoretical or practical, and only helps to make people more tolerant of tyrannical laws and tyrannical administration than they ought to be. It is only a device of despotism to mix up a little pious talk about morality and religion with an unpalatable legal pill. It is much better that the law in all its harshness and its makers in all their legal irresponsibility should stand out clearly before the eyes of those who are required to obey. For then there is most likelihood of the moral responsibility of the legal sovereign being stringently enforced.

Let us, then, leave to the lawyer *quâ* lawyer his legal sovereign, and pass to consider, what is a matter not of jurisprudence but of political philosophy—the nature of the ultimate political sovereign. What has kept the Constitution of the United States more unaltered for over a hundred years than that of any country of Europe? What prevents the British Parliament from introducing a Decennial Act in the same fashion in which the Whigs of 1716 introduced the Septennial Act? What restrains the Sultan from ordering his subjects to burn the Koran and eat pork? In every case it is not a determinate person or persons, but *opinion*.

"As Force is always on the side of the governed, the governors have nothing to support them but opinion. It is therefore on opinion only that government is founded, and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular."—Hume's *Essays*, Part I., Ess. iv.

With this passage of Hume we may compare the remarks of Professor Bryce in his discussion of "Government by Public Opinion." (*The American Commonwealth*, chap. 77.)

"Governments have always rested, and, special cases apart, must rest, if not on the affection, then on the reverence or awe, if not on the active approval, then on the silent acquiescence of the numerical majority."

This is the truth which is contained in the famous doctrine of "the sovereignty of the people"—a doctrine which by no means originated in the revolutionary brain of Rousseau, but was well known at the time of the Reformation to both Catholics and Protestants, and was frequently used by one or the other to justify the deposition and even the assassination of rulers—who belonged to the opposite faith.<sup>1</sup> It is the doctrine expressed by Locke in the words: "There remains in the people a supreme power to remove or alter the legislative." Austin himself accepts the statement "that every government continues through the people's *consent*," if interpreted as follows:

"That in every society, political and independent, the people are determined by motives of some description or another, to obey their government habitually; and that, if the bulk of the community ceased to obey it habitually, the government would cease to exist."—*Jurisprudence*, i. p. 305.

The problem of good government is the problem of the proper relation between the legal and the ultimate political sovereign. Under primitive conditions, when the political sovereign is as yet unconscious of his sovereignty, the fitting form of government is the rule of the one, the absolute king, who administers justice according to supposed immemorial or divinely-instituted custom. When a people begins to become conscious of its political existence, a want of harmony may show itself between the mass of the people and the despotic rulers, who will be ruling now in accordance with the opinion of past generations and not of their actual subjects. Then the old system is on the verge of a revolution, peaceable or otherwise.<sup>2</sup> Rep-

<sup>1</sup> See Janet, *Histoire de la Science Politique*, Liv. III. ch. iii. and iv.

<sup>2</sup> Cf. Bryce, *The American Commonwealth*, iii. pp. 16, 17, chap. 77.

representative institutions, petitions, public meetings, a free press, are various means through which the political sovereign can assert itself. When refused such means, and when yet sufficiently vigorous to use them, it will assert itself by armed rebellions, or, if that is not possible, by secret conspiracies and by assassinations, which being approved by the general conscience, are morally different from ordinary murders. Political assassination is a clumsy and generally ineffective method of moving a vote of censure on the government in countries where the opposition has no constitutional means of expression. When discontent is "driven beneath the surface," if sufficiently strong it will produce political earthquakes. Statesmanship has been defined as "the art of avoiding revolutions," and this is so far true that the wise statesman will make revolution impossible by making it unnecessary, or else certain of failure, because not supported by the "general will." But the "general will," or ultimate force of public opinion, does not reside in a determinate number of persons. Rousseau falls into an error, from which he himself has provided a way of escape, when he inclines to think the general will (*the volonté général* which he expressly distinguishes from the *volonté de tous*) can only be properly exercised by all the individuals collectively. A great deal may indeed be said on behalf of the direct exercise of political power, as among the citizens of Uri and Appenzell: a great deal may be said on behalf of the democratic device of the *referendum* as an excellent conservative check upon the "hasty legislation" of an elected assembly; but the sovereignty of the people is not exercised only in direct democracies. It may be and is exercised in many cases through an absolute monarch, or a dictator, or a small assembly of public-spirited and far-sighted nobles or ecclesiastics. Owing to the tendencies of human selfishness, want of imagination, and narrowness of view, the probability is that the interests of the unrepresented will not be properly nor systematically cared for. When

a prince really cares for his people, when an aristocratic assembly overcomes the prejudices of caste-feeling, there is admiration as at some rare and curious phenomenon. But only a bigoted belief in the *forms* of democracy can prevent a historian from recognizing that the "general will" has frequently found expression through the legal sovereignty of the very few.

The same habit of looking for political sovereignty in determinate persons leads to a great many of the prevalent confusions about majorities and minorities. It seems a plausible argument when it is said that there is very little gain if the tyranny of a majority is substituted for the tyranny of a minority, and a decided loss if the tyranny of an unenlightened majority is substituted for the tyranny of an enlightened minority. Quite true—if the rule of the majority is a tyranny. But "tyranny of the majority" requires definition. "A majority is tyrannical," says Professor Bryce (*The American Commonwealth*, chap. 85), "when it decides without hearing the minority, when it suppresses fair and temperate criticism on its own acts, when it insists on restraining men in matters where restraint is not required by the common interest, when it forces men to contribute money to objects which they disapprove, and which the common interest does not demand." Apart from such tyranny, the rule of the majority has the important advantage, pointed out in a memorable phrase by Mr. Justice Stephen: "We count heads to save the trouble of breaking them." Counting heads—even if they be foolish heads—is an invention which, on the whole, has promoted human well-being. *The* important right of a minority is the right to turn itself into a majority if it can. And if the right of free expression of opinion and of association for the purpose of promoting opinion be secured to a minority, we cannot reasonably say there is tyranny. If a majority believe in the reasonableness of its position, it need not fear the free discussion of it; and if a minority believes in itself and in the reasonableness

of its position, it requires nothing more. To give every elector or every member of an elected assembly an equal vote is a convenient device; it promotes security by preventing the feeling on the part of the majority that there is a grievance, and in the long run it leads to votes being not merely counted, but weighed. Men hold their opinions with very different degrees of strength and conviction. Ten persons who are firmly convinced of the social expediency of their policy can, if they stick together and are allowed freedom of association and of expression, very speedily turn themselves into ten thousand, if they have only lukewarm and half-hearted antagonists. (Of course, I am not referring to scientific opinion as to what *is*, but to practical opinion as to what *ought to be done*.) We talk of people having opinions; in the majority of cases it is the opinions that have the people. A political idea, a national sentiment, the spirit of the age, do not, certainly, float about like clouds in the air; they can only exist in the minds of individuals, but they exist in the minds of individuals with very different degrees of intensity, and the individuals differ very much in the degree in which they are conscious of them. The man in whom an idea, that is only vaguely present in the minds of others, rises into distinct consciousness, and who can give expression to that idea in such a way as to awaken others to the consciousness of it and of its importance—such an one is a leader of men. The practical leader, as is often noticed by historians and politicians, must not be too much in advance of his contemporaries; but if he have not a more distinct consciousness of the aims for which others are blindly or half-blindly striving, he is in no sense a leader. Sir Robert Peel, a statesman not incapable of popular sympathies, described "public opinion" (in a letter written in 1820) as "that great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy, and newspaper paragraphs." In the same generation Hegel said: "In public opinion are contained all sorts of falsehood and

truth." So far he only says the same thing as Peel; but he goes on to add: "To find the truth in it is the business of the great man. He who tells his age what it wills and expresses, and brings that to fulfilment, is the great man of the age." (*Phil. des Rechts*, § 318, p. 404.) The great man must be able to discern between the real and growing forces in public opinion, and the mere seeming and transitory or decaying elements in it.<sup>1</sup> But the man whose ideas and sentiments are out of all relation to those of his own age cannot exercise any effect upon it.

When we say that the legally irresponsible legal sovereign is, as a matter of fact, responsible (morally and physically) to the ultimate political sovereign, does not this mean that the ultimate political sovereign is the mere incarnation of the force of the majority? Physical force may be disguised behind the mechanism of voting; but it is force in the last resort. As Locke puts it, "It is necessary that the body should move whither the greater force carries it, which is the consent of the majority." (*Civil Government*, II., c. viii. § 96.) This force may be guided by wise or by foolish leaders; but it is force nevertheless. Whether a government maintains itself or is overthrown, it is force that decides. Well, so it is. All ultimate questions of political, as distinct from mere legal, right are questions of might. The repugnance to this conclusion arises simply from the ambiguity of language. The word "force" seems to suggest mere brute strength, exclusive of spiritual elements. But the force which can operate among human beings successfully and continuously is never mere brute strength. Discipline, skill, self-control, fidelity are elements necessary to the success of even what we call "the force of arms;" and these are all spiritual elements. And a great deal more than these is necessary in order to establish a

<sup>1</sup> This is what is implied in the words in Hegel which follow those quoted: "He does and realizes what is the inner essence of his age: and he who does not know how to despise public opinion as he hears it here and there, will never attain to what is great."

secure government. "You can do anything with bayonets —except sit on them." All government must have force at its disposal; but no government can last which has merely force at its disposal, even the force of a veteran army of professional soldiers. All government implies *consent* as well as *force*. These are the two elements which are recognized separately and in one-sided fashion in the theory of social contract on the one hand, and in the theory of law and sovereignty maintained by Thrasymachus, Hobbes, and Austin on the other. A law, to be a law in the true sense, must have the regulated force of the community behind it; but in order to be habitually obeyed and permanently enforced, it must be recognized not merely as "good law" (in the lawyer's sense), but as *a* good law (in the layman's sense), *i.e.*, it must be in accordance with the "general will," it must be thought to promote the common good; or, at least, its tendency to injure the common good must not yet be recognized. It is not necessary that every law should be explicitly approved by everyone who obeys it; that is the impossible demand of individualism, which, carried to its logical issues, is anarchy, and makes all law alike impossible and superfluous. But the great majority of those who habitually obey must recognize the general expediency of the law, or, if not, they must feel themselves able to obtain its alteration, or else they must not yet have awakened to the need of any alteration.

Is there no limitation to this ultimate political sovereignty? Within the nation it might be said there was such in the responsibility of a people to its own future. But that responsibility is part of what we include in the "general will": the ultimate political sovereign is not the determinate number of persons now existing in the nation, but the opinions and feelings of these persons; and of those opinions and feelings the tradition of the past, the needs of the present, the hopes of the future, all form a part. But may there not be a limitation outside of the nation? We

are thus led to consider the external aspect of sovereignty. In Austin's definition, the words "independent" and "not in a habit of obedience to a like superior" were expressly inserted by him to obviate the objections he found to Bentham's definition of a political society, on which his own is based more directly than on any other. The external aspect of sovereignty, however, came to be recognized and debated in modern times before the internal aspect was much considered. The external aspect of sovereignty is a negative aspect (as is sufficiently expressed by Austin's word "independent"), and for that reason allows of precise definition. The Greek term *Autonomos* expresses the absence of obedience to any external authority, but it also suggests a self-governing community, and would not have been applied to the empire of the Persian king. The Greeks started their political life, or, at all events, they started their political thinking with the assumption of the isolated city-state as the true political society. A larger society than the city represents to Aristotle an inferior, and not a higher, stage of political development. Ties of religious observance and of sentiment, as well as a common language and a common culture, bound together the whole Hellenic world as distinct from "the barbarians." But the independence of the city-state was too deeply rooted in Greek ways of thought and life to allow of the absorption of these numerous societies under a strong central government. Such an absorption meant the extinction of freedom. The experiment of federation—the only method of reconciling autonomy and union—came too late, and was not tried under favorable conditions.

The nations of modern Europe, on the other hand, grew up under the shadow, or the ghost, of the Roman Empire, and were held together by the more real unity of the Catholic Church. The modern idea of national sovereignty, *i. e.*, of complete independence of external authority, only gradually won its way, and the assertion of national sovereignty went along with the decay of the Holy Roman

Empire and the revolt of the Northern nations against the authority of the Pope. On the external side a "sovereign prince" means a "sovereign nation"; though, of course, a sovereign nation may be a sovereign, *i. e.*, independent, republic. The internal significance of sovereignty became a prominent theoretical and practical question only after the external question had been settled.

The recognition of international law may seem in a certain sense a limitation on the absolute sovereignty of the nation; but it is no *legal* limitation, because it is a limitation which is self-imposed. The independent nation, as Austin and his school rightly insist, has no legal superior. But the recognition on the part of a nation's representatives that the nation is one of a community of nations, with moral, though not legal, claims on one another, which are backed up by the irregular penalties of war, does impose a moral check on the unlimited independence of a nation, in the same sense in which the recognition of the will of the ultimate political sovereign imposes a moral check on the legal sovereign.

When Austin and his followers insist that international law is not *law*, the plausibility of the remark is mainly due to the fact that the English language possesses no equivalent for *Fus*, *Droit*, *Recht*. International law is not *Lex*: it is *Fus*. But the Austinian criticism does good service by indirectly calling attention to the fact that only the growth of international morality makes possible the growth of international law. International law is law of the primitive type: it is custom. And the sanctions which deter from violating it are the anger and hatred of other nations, which may possibly or very likely result in the use of physical force. In the rudest societies of men there are customs enforced by no regular judicial penalties, but rigidly observed through fear of the consequences of violations. They are in the pre-political state; and if we call lating them; and so it is in the, as yet, rude society of it the "state of nature," we must recognize that that is no

longer always the "state of war." The community of nations is as yet only an idea: it has no legal or political existence. But it is an idea, and as such it forms the basis of international law.

The relations of the several nations to the whole of humanity is the problem with which a Philosophy of History attempts to deal, and from which the practical statesman cannot escape. The several nations are not permanent, self-identical, mutually exclusive units. The evolution of humanity causes new groups to form themselves by union and division out of those already existing. Statesmen, trained in despotic ideas, and endeavoring to regulate national boundaries from above and from without, have often separated those whose spirit was seeking unity and united those who could not be fused into a homogeneous people. The history of Europe since the Congress of Vienna is a commentary on the impossibility of fixing, by external authority, what are "independent political societies." A people in becoming conscious of itself insists on marking off its own limits as well as on determining the character of its government.

When we speak of humanity as something behind every particular sovereign nation, this is no empty phrase. The movements, whether economic, intellectual, moral, religious, or political, going on in one nation, affect the movements going on in others. No nation, for instance, can be freed or enslaved, enriched or impoverished, without other nations feeling the consequence. Thus, in the light of history, no nation is, as *a matter of fact*, ultimately irresponsible to the future and to other nations. If it is responsible, what, then, is the sanction? It is the penalty of death—the penalty of perishing by internal dissensions or by foreign conquest. "Natural selection" determines in the last resort which nations shall survive, what groupings of mankind are most vigorous, and what organizations are most successful. *Die Weltgeschichte ist das Weltgericht.*

Just as it is the business of the ordinary statesman so to

guide the legal sovereign that it does not provoke the displeasure of the ultimate political sovereign, it is the business of the greatest statesman so to guide the whole people that they may adopt those forms which will insure their continuance and their progress. The really great leader will anticipate on behalf of his people what painful experience might otherwise teach too late.

DAVID G. RITCHIE.

*Jesus College, Oxford.*